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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,

Appellant,

v.

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE STATE OF NEW YORK JOINED BY THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN AND WYOMING, AS *AMICI CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JULIUS GREENFIELD
Assistant Attorney General
of Counsel

Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Opinions Below

The opinion of the New York Court of Appeals (App. 38-39) is reported at 24 N. Y. 2d 30, 246 N. E. 2d 517 (1969). The unanimous affirmance without opinion, by the Supreme Court, Appellate Division, First Department,

is reported at 30 A. D. 2d 778, 292 N.Y.S. 2d 353 (1968). The memorandum opinion of the Supreme Court, New York County is not officially reported. It is set forth at page 1 of the appellant's brief.

Jurisdiction

The order of the New York Court of Appeals was entered on February 20, 1969. The notice of appeal was filed on April 4, 1969 and probable jurisdiction was noted on June 16, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1257 (2).

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The New York State Constitution, Article 16, § 1, provides in relevant part:

> "Exemption from taxation may be granted only by general laws: Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any, corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

The New York Real Property Tax Law § 420(1) provides in part:

> "Real property owned by a corporation or association organized exclusively for the moral or mental

improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playgrounds, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes * * * and used exclusively for carrying out thereupon one or more of such purposes * * * shall be exempt from taxation as provided in this section."

Question Presented

Assuming that this Court is satisfied that there is jurisdiction under *Doremus* v. *Board of Education*, 342 U. S. 429 (1952), the question is whether the exemption from taxation which includes the real property of religious organizations, used exclusively for their religious purposes, violates the First and Fourteenth Amendments to the United States Constitution.

Interest of the State of New York

The New York Constitution, Article XVI § 1 and the New York Real Property Tax Law § 420(1) insofar as they include the exemption of religious organizations are the subject of the appellant's attack. This brief is being filed pursuant to the provisions of Rule 42(4) of the Rules of this Court. The Attorney General has the statutory function of defending the constitutionality of such provisions. New York Executive Law, Section 71.

Statement of the Case

Appellant is the owner of certain real property located in the County of Richmond, State of New York. His action against the Tax Commission of the City of New York is predicated upon the contention that tax exemptions for the tax year beginning July 1, 1967 which are granted

to religious corporations for real property used by them for religious purposes (together with other non-profit organizations), violate his religious freedom and confiscate his property without due process of law (App. 6). The motion for summary judgment of the Tax Commission was granted by a Special Term of the New York Supreme Court, which said, "Such exemptions are granted in pursuance of long-standing public policy of this State under a statute which is presumptively constitutional and which is hereby sustained". The Appellate Division unanimously affirmed without opinion (App. 30). The Court of Appeals also unanimously affirmed, in a per curiam opinion in which all but one judge concurred, saying that, "* * * courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States * * *" (App. 38-39). This appeal followed. Thereupon the appellee, Tax Commission, moved to dismiss the appeal. This Court noted probable jurisdiction on June 16, 1969.

Summary of Argument

The compelling public purpose served by religious organizations is constitutionally sufficient to warrant tax exemption of property devoted exclusively to religious purposes. This has been the traditional view both before and after the adoption of the federal and state constitutions. All of the states and the District of Columbia have various forms of tax exemptions for these purposes. These exemptions have co-existed harmoniously with the provisions of state constitutions and state law which mirror the first Amendment restrictions of the United States Constitution. The rigid rhetoric of "a wall between church and state" has been recognized to be a starting point only for determining, in a particular case, whether the rationale and purpose of the First Amendment are offended by state

or federal action. Legislatures may select the subjects of taxation in their discretion. Uniformity of taxation does not require that everything which might be made taxable should be taxed. Tax exemption does not offend the doctrine of strict neutrality. There is no constitutional requirement that government be hostile to religion.

ARGUMENT

The state may properly exempt from taxation the property of religious organizations. Such exemptions do not violate the United States Constitution.

Based upon the importance of religion to the public welfare, it has been accepted as axiomatic from colonial days that the property of religious organizations is devoted to a public use which ought not to be the subject of taxation. *People ex rel. Watchtower Soc.* v. *Haring,* 8 N. Y. 2d 350, 357 (1960), 170 N. E. 2d 677. Tax exemptions of this nature exist in every state of the union and the District of Columbia[1] and they have co-existed harmoniously with statutory and constitutional provisions of the various states directed toward the same purposes as the First Amendment to the United States Constitution.

The moral, ethical, cultural and social contributions of religion are too well known to require extended comment. *Bradfield* v. *Roberts,* 175 U. S. 291 (1899). In addition, similar activities which might also be classified as the secular branch of religious activities, particularly those which fall within the traditional role of religion in the broad spectrum of charitable activities, are of inestimable benefit to the community. In the Ordinance of 1787: The Northwest Territorial Government, enacted by the Con-

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[1] See appendix listing the Constitutional and statutory tax exemption provisions of the various states and the District of Columbia.

federate Congress on July 13, 1787, it was stated, in Article III:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

In New York the state legislature, in the same session in which it repealed colonial acts establishing the Episcopal Church in certain counties of New York (Chapter 38 of the Laws of 1784), also passed an act which permitted the incorporation of all religious denominations. The preamble to that act (Chapter 18 of the Laws of 1784) stated in part:

> "And whereas it is the duty of all wise, free and virtuous governments, to countenance and encourage virtue and religion, and remove every lett or impediment to the growth and prosperity of the people, and to enable every religious denomination to provide for the decent and honorable support of divine worship agreeable to the dictates of conscience and judgment."

The public policy of New York of exempting religious and charitable real property from taxation was evinced early in the history of the state. The Laws of 1799, Chapter 72 provided for the assessment and collection of taxes upon real and personal property. It was also provided:

> "And be it further enacted, that no house or land belonging to the United States, or to the people of the State, nor any church or place of public worship, or any personal property belonging to any ordained minister of the Gospel, nor any college or incorporated academy, nor any schoolhouse, court house, gaol, alms house or property belonging to any incorporated library, shall be taxed by virtue of this act."

Similar exemption provisions were enacted by the New York Legislature by the Laws of 1801, Chapter 179; Laws of 1813, Chapter LII; Laws of 1823, Chapter CCLXII; which were collated in the Revised Statutes of 1829, Chapter XIII, Title I, Section 4 and by the Laws of 1883, Chapter 397.

In 1893, the statutory exemption provisions began to take a form substantially similar to the present provisions of Real Property Tax Law § 420(1). The Laws of 1893, Chapter 498 provided:

> "The real property of a corporation or association organized exclusively for the moral and mental improvement of men or women or for religious, charitable, missionary, hospital, educational, patriotic, historical or cemetery purposes, or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes shall be exempt from taxation of * * *".

By the Laws of 1896, Chapter 908, additions were made to the group of exempt organizations. These additions included bible, tract, benevolent, infirmary, scientific, literary, library and other organizations for the enforcement of laws relating to children or animals. The statute as it presently exists, Real Property Tax Law § 420(1), was enacted in 1958 (Laws of 1958, Chapter 959) and essentially it is a re-enactment of the 1896 statute. The New York State Constitutional provision authorizing exemptions from taxation, Article XVI § 1, was adopted in 1938.

The grouping of church exemptions with public property and charitable property exemptons is significant. It stems from the prevailing belief that encouragement of religion serves the general public welfare. It is noteworthy that the present exemption provisions in Real Property Tax Law § 420(1) are cast in a similar frame of

reference, "religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational * * * purposes."

The social value of religion is at least equal to the social and economic values which form a basis for other permissible exemptions, such as those for charitable or educational purposes. In *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), in the concurring opinion of Mr. Justice Brennan it was said (at pp. 301-302):

> "D. *Uniform Tax Exemptions Incidentally Available to Religious Institutions.* Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God."

And in the concurring opinion of Mr. Justice Goldberg, in which Mr. Justice Harlan joined, it was said (p. 306):

> "It is said and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to

> the secular and a passive or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

Entirely apart from these considerations there are compelling reasons for the state not to tax the property of religious organizations devoted to religious uses. It has been suggested that since this property does not normally generate income the imposition of taxes could amount to a substantial interference with the free exercise of religion. The same writer points to a fundamental economic difference between appropriating revenues for churches and failing to send tax bills.[2]

> "In the case of direct subsidy, the state forcibly diverts the income of believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."

These impositions, it is said, would divert church revenues from "socially valuable, privately organized educational and charitable activities."

Thomas Jefferson and James Madison were two of the outstanding spokesmen for the anti-establishment position. It was Jefferson who apparently first used the phrase "a wall of separation between church and state." Madison, who was primarily responsible for the First Amendment, stated that his understanding of its meaning was that "Congress should not establish a religion, and enforce the legal observation of it by law nor compel men to worship God in any manner contrary to their con-

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[2] Ginnella: Religious Liberty, Nonestablishment and Doctrinal Development, Part II The Nonestablishment Principle, 81 Harv. L. Rev. 513, 553 (1968).

science.'"[3] Yet it is quite clear that neither Jefferson nor Madison regarded this "wall" as an immutable categorical commandment. For example in the administration of both presidents, federal funds were used to aid religion in various ways, including the support of chaplaincies and missionaries to the indians. Of even greater significance is the fact that an act exempting church property in the District of Columbia from taxation was first enacted in 1802[4] and in 1804, when Congress amended the act incorporating the City of Washington, it permitted this exemption to stand.[5] This, of course, was during Jefferson's tenure as president.

Similar compatible practices have continued to present times as witness the exemption of clergyman, divinity students and conscientious objectors from the draft, the use of the bible for administering oaths, the availability of NYA and WPA funds to public and sectarian schools during the depression, special postal privileges to religious organizations, the eligibility of hospitals owned by religious organizations for aid under the Hill-Burton Hospital Construction Act,[6] the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of thirty-five denominations,[7] the exemption from taxation of religious, charitable, educational and other similar corporations,[8] the income tax charitable deduction for contributions to charities and churches[9] and the estate tax deductions for bequests and

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[3] 1 Annals of Congress 729-731 (Benton Ed. 1858).

[4] Washington City Laws 1802-03, Act of October 6, 1802.

[5] Act of February 24, 1804, Ch. 14, 2 Stat. 254.

[6] Hill-Burton Act of 1946, 60 Stat. 1040, 42 U.S.C. §§ 29-92.

[7] 58 Stat. 765 (1944), 40 U.S.C. §§ 484(j) and 484(k); 107 Cong. Rec. 18501.

[8] 26 U.S.C. § 501(a) and (c).

[9] 26 U.S.C. § 170.

devises to religious, educational, charitable and other similar organizations.[10]

Although it is for this Court ultimately to determine whether federal constitutional guarantees are offended, it should not be "indifferent to the unanimous opinion of generations of judges" nor ignore that consensus of views. *McGowan* v. *Maryland*, 366 U. S. 420, 510 (1961). Referring to the time honored practice of the legislatures in continuing exemptions of church property, it was said in *Snyder* v. *Town of Newtown*, 147 Conn. 374, 161 A. 2d 770, 776 (1960), app. dismissed 365 U. S. 299 (1961):

> "A practical construction placed upon a constitutional provision immediately after its adoption and consistently and repeatedly followed by the legislature for over a century is most persuasive."

The appellant has been unable to point to a single state or federal case in which religious tax exemptions have been held invalid. This stems from the fact that in an uninterrupted series of determinations of long standing these tax exemptions have been held constitutionally inoffensive.[11]

Moreover, as was said by Mr. Justice Holmes in *Interstate Consolidated Street Ry. Co.* v. *Commonwealth of Massachusetts*, 207 U. S. 79, 88 (1907):

> "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly

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[10] 26 U.S.C. § 2055.

[11] *Trinity Church* v. *City of Boston*, 118 Mass. 164 (1875); *Trustees of Griswold College* v. *State*, 46 Iowa 275 (1877); *Trustees of the First Methodist Episcopal Church South* v. *The City of Atlanta*, 76 Ga. 181 (1886); *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644 (1956) app. dismissed sub nom *Heisey* v. *County of Alameda*, 352 U. S. 921 (1956); *Snyder* v. *Town of Newtown*, 147 Conn. 374 (1960) app. dismissed 365 U. S. 299 (1961); *General Finance Corp.* v *Archetto*, 93 R. I. 392 (1961), app. dismissed 369 U. S. 423 (1961); *State ex rel. Reynolds* v. *Nusbaum*, 17 Wis. 2d 148 (1962); *Murray* v. *Comptroller of the Treasury*, 241 Md. 383 (1966) cert. den. 385 U. S. 816 (1966).

that it goes beyond that power. In case of real doubt a law must be sustained."

The principles enunciated in *Everson* v. *Board of Education*, 330 U. S. 1 (1947) have been the subject of much critical appraisal. The essence of that opinion is contained in the statement at pages 15 and 16. It is there said:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'."

Appellant's simplistic reliance upon a re-statement of these principles does not approach the problem before this Court. As was said by Mr. Justice Frankfurter in *McCollum* v. *Board of Education*, 333 U. S. 203, 212-213 (1948):

> "This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solu-

> tion of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church and State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' But agreement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State', does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase."

In the cases that have followed this Court has formulated other criteria. In *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952), it found that there was "no constitutional requirement for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence". In *McGowan* v. *Maryland, supra*, 366 U. S. at 443-444, it observed that the public financing of transportation in *Everson* had been upheld because the purpose and effect of the statute was the general welfare and in *Abington School Dist.* v. *Schempp, supra*, 374 U. S. at 222, this Court enunciated the purpose and primary effect test, saying:

> "That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion * * *."

Most recently, in upholding the New York law authorizing the free lending of text books to children in private schools, *Board of Education* v. *Allen*, 392 U. S. 236 (1968),

this Court relied upon that test and held that the law provided a valid secular purpose program. This holding has given rise to the observation that the states are not precluded from pursuing such programs even though they give incidental aid to religion.[12]

Whether or not this is a permissible interpretation of the *Allen* holding, the rationale of that determination would appear to have even more compelling application in the case of religious tax exemptions. The New York Court of Appeals has held that loss of potential tax revenues resulting from these exemptions does not warrant their denial. In *Matter of Diocese of Rochester* v. *Planning Board*, 1 N. Y. 2d 508 (1956), the Court held (p. 526) that, "• • • church and school and accessory uses are, in themselves, clearly in furtherance of public morals and general welfare". Speaking of these exemptions, the Court said (p. 524):

> "Section 1 of Article XVI of the Constitution of this State provides that 'real or personal property used exclusively for religious, educational or charitable purposes' shall always be exempt from taxation, and such institutions have been granted tax exemption (Tax Law § 4, subd. 6). Thus the paramount authority of this State has declared a policy that churches and schools are more important than local taxes, and that it is in furtherance of the general welfare to exclude such institutions from taxation."

In *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957), the application of the District of Columbia Code § 47-801a was in issue. That statute exempts from taxation, "churches, including buildings and structures reasonably necessary and usual in the perform-

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[12] Kauper, The Warren Court: Religion Liberty and Church-State Relations, 67 Mich. L. Rev. 269, 285 (1968).

ance of the activities of the church". In the course of upholding the exempt status of the petitioner, the Court said, in an opinion by then Circuit Judge Burger (p. 129):

> "Congress in granting tax exemptions under this statute, like most of the states, was giving expression to a broad legislative purpose to grant support to elements in the community regarded as good for the community. In the exercise of its undoubted power Congress has extended tax immunity not only to sincere and bona fide religious activities but also to various educational and patriotic societies and groups whose programs are thought to be in the public interest and welfare. The exemption of buildings belonging to 'religious corporations or societies' is in a context of exemption to art galleries, libraries, public charities, hospitals, schools and colleges and many named organizations."

The parallel logic of these views is demonstrated by the three state court cases explicitly upholding religious tax exemptions in the face of attack based on First Amendment considerations. This Court denied review in all three cases. In the first case, *Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, 298 P. 2d 1 (1956), app, dismissed *sub nom Heisey* v. *County of Alameda,* 352 U. S. 921 (1956), it was held (298 P. 2d at p. 7), that the exemption was enacted to promote the general welfare and that, even if it benefited religious organizations, it did not violate the First Amendment. The California Court adverted to the time honored practice of granting exemptions of church property and the existence of these exemptions in all states and the District of Columbia. It then concluded that the principle of separation of church and state was not impaired by granting tax exemptions to religious groups.

General Finance Corporation v. *Archetto,* 93 R. I. 392, 176 A. 2d 73 (1961), app. dismissed 369 U. S. 433 (1962),

involved a similar First Amendment attack on tax exemptions and a similar rejection. The Rhode Island Court pointed out that (176 A. 2d at p. 78):

> "In granting tax exemptions to religious organizations, however, it seems to us that the incidental benefit is not such as to constitute direct participation by state authorities in the promotion of religious education, as the court indicated was the case on the facts peculiar to the McCollum decision."

More recently, in *Murray* v. *Comptroller of the Treasury*, 241 Md. 383, 216 A. 2d 897, cert. denied 385 U. S. 816 (1966), it was noted that tax exemptions to religious organizations had long been regarded as reasonable and for a public purpose. The grant of exemptions to church property, the Court said, does not support religious bodies in the sense that the state espouses their acceptance (216 A. 2d at p. 906). The prevailing and unanimous belief among the states that tax exemptions do not violate constitutional prohibitions is evident from the existence of such exemptions in every state and the District of Columbia. Furthermore, a major part of the activities of religious organizations consists of activities of a secular nature which serve public needs and save public expense. To deny those exemptions in the face of similar exemptions for charitable institutions would raise serious questions of unconstitutional discrimination (p. 907). The Court then concluded that the exemption of religious real property did not violate the "establishment" clause and was constitutional.

The determinations in these cases are consistent also, with the view expressed by Mr. Justice Reed in his dissenting opinion in *McCollum* v. *Board of Education*, 333 U. S. 203, 249 (1948):

> "It seems clear to me that the 'aid' referred to by the Court in the Everson case could not have been those

incidental advantages that religious bodies, with other groups similarly situated, obtain as a by product of organized society. This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation."

Moreover, basic to all tax exemptions is the repeatedly accepted constitutional principle that the state is free to select the subjects of taxation, may decline to tax other kinds of property and neither due process nor equal protection imposes any rigid rule of equality of taxation.[13] It was held in *Bell's Gap RR Co.* v. *Pennsylvania,* 134 U. S. 232, 237 (1890) that:

"The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions."

The policy and principle supporting tax exemptions are stated in Cooley's Constitutional Limitations, Eighth Edition Vol. 2, at pages 1086-89 as follows:

"The legislature must also, except when an unbending rule has been prescribed for it by the constitution, have power to select in its discretion the subjects of taxation. The rule of uniformity requires an apportionment among all the subjects of taxation within the districts; but it does not require that everything which the legislature might make taxable shall be made so in fact. Many exemptions are usually made from taxation from reasons the cogency of which is at once

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[13] *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495 (1936); *Williams* v. *Baltimore,* 289 U. S. 36 (1933).

> apparent. * * * The property of educational and religious institutions is also generally exempted from taxation by law upon very similar considerations, and from a prevailing belief that it is the policy and interest of the State to encourage them."

It is not necessary, in order to sustain tax exemptions to religious organizations, to fall back upon the worn cliche that, "the power to tax is the power to destroy". Nor, equally, is it necessary to invoke the free exercise clause as the basis for the argument that the imposition of taxes would violate that right. *Cf. Follett* v. *McCormick*, 321 U. S. 573 (1944). It is sufficient if the injunction of *Everson* (*supra*, 330 U. S. at 18) is observed:

> "That [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

While the First Amendment precludes aid to religion as such, aid extended to religious activities incidental to a broader classification which rests on legitimate secular and public welfare basis is constitutionally permissible. *Abington School District* v. *Schempp, supra,* 374 U. S. pp. 214-215, 222. This exemption concept, of such standing as to bear the imprint of long generations of approval, differs completely from the tax system used to support an established church. Indeed, as is suggested by Kauper:[14]

> "In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not

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[14] Kauper, The Constitutionality of Tax Exemptions for Religious Activities in, "The Wall Between Church and State" 95, 110 (Oaks ed. 1963).

an accidental or vestigial survival of outmoded practices."

The selection of religious organizations for tax exemption, as in the case of charitable, educational and other similar organizations, reflects the policy of the law to encourage and foster these institutions for the reason that they are beneficial to the public and necessary to the advancement of civilized society. The legislative judgment which permits this accommodation to religion represents a weighing of a wide variety of views and should be respected in the absence of a clear showing of violation of the duty of neutrality. True neutrality, it is submitted, is observed in the policy that declares that the property of religious institutions used for religious purposes, should not be the subject of taxation.

The practical consequences of invalidating these exemptions is obvious. Of greater consequence however, would be to overturn a practice sanctioned by time, custom, general prevalence and to this point, universal judicial approval. This Court has said that the doctrine of reasonable doubt will be construed most strongly in favor of state tax legislation. *Madden* v. *Commonwealth of Kentucky*, 309 U. S. 83 (1940). That principle is fully applicable here.

CONCLUSION

The New York constitutional and statutory provisions should be upheld. Consequently, the judgment appealed from should be affirmed.

Dated: New York, New York, October 8, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JULIUS GREENFIELD
Assistant Attorney General
of Counsel

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APPENDIX

Religious Exemptions Granted By

	Constitutional Provision		
	Mandating Exemption	*Authorizing Legislation*	*Statutory Provision*
Alabama		Art. IV, § 91	Title 51, § 2
Alaska	Art. IX, § 4		
Arizona		Art. IX, § 2	Title 42, § 42-271(6)
Arkansas	Art. XVI, § 5		Title 84, § 84-206(1st)
California		Art. XIII, § 1c	§ 206, § 214, § 214.5, Rev. & Tax C.A.
Colorado	Art. X, § 5		§ 137-2-2
Connecticut			Title 12, 12-81(13)
Delaware		Art. VIII, § 1	Title 9, § 8103
District of Columbia			§ 47-801a
Florida	Art. XVI, § 16		Title 13, § 192.62
Georgia		Art. VII, § 1, ¶ 4	§ 2-5404 Title 92, § 92-201
Hawaii			§ 128-18(3)
Idaho			Title 63-105B
Illinois		Art. IX, § 3	Title 120 § 500.2
Indiana		Art. X, § 1	Title 64, § 64-201, ¶¶ 5th & 6th

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	Constitutional Provision		
	Mandating Exemption	*Authorizing Legislation*	*Statutory Provision*
Iowa	Art. II, § 1		§ 427.1(9)
Kansas	Art. XI		§ 79-201
Kentucky	§ 170 (acreage limit)		
Louisiana	Art. X, § 4(2)		
Maine			Title 36, § 652 (1) (G)
Maryland			Art. 81, § 9(4)
Massachusetts			Ch. 59, § 5
Michigan	Art. IX, § 4		§ 211.7
Minnesota	Art. IX, § 1		§274.02
Mississippi			Title 39, § 9697(d)
Missouri		Art. X, § 6	Title 10, § 137.100(5)
Montana		Art. XII, § 2	Title 84, § 84-202
Nebraska		Art. VIII § 2	Ch. 77, § 77-202
Nevada			Title 32, 361.125
New Hampshire			Ch. 72, § 72:23(III)
New Jersey	Art. VIII, § 1 and 2		§ 54:4-36
New Mexico	Art. VIII, § 3		
New York	Art. XVI, § 1		§ 420, R.P.T.L.
North Carolina		Art. V, § 5	§ 105-296(3) (4a)

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	Constitutional Provision		
	Mandating Exemption	*Authorizing Legislation*	*Statutory Provision*
orth Dakota	Art. XI, § 176		§ 57-02-08(7)
hio		Art. XII, § 2	§ 5709.07
klahoma	Art. X, § 6		Title 68, § 2405(g)
regon			Ch. 307, § 307.140
ennsylvania		Art. VIII, § 2(a)(i)	72-§ 5020-204
hode Island			Title 44, §44-3-3
. Carolina	Art. X, § 4		§ 65-1522(14)
. Dakota		Art. XI, § 6	§ 57.0311
ennessee		Art. II, § 28	67-502(2)
exas		Art. VIII, § 2	Title 122, Art. 7150(1)
tah	Art. XIII, § 2		Title 59, § 59-2-1
ermont			Title 32, § 3802(4)
irginia	Art. XIII, § 183		Title 58, § 58-12
ashington		Art. VII, § 2	Title 84, § 84.36.020
est Va.		Art. X, § 1	§ 11-3-9
isconsin		Art. VIII, § 1	§ 70.11
yoming		Art. XV, § 12	Title 39, § 39-7(5)(G)

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The following Attorneys General joined in the submission of the foregoing brief:

ALABAMA

HON. MAC DONALD GALLION
Attorney General
Montgomery, Alabama 36104

ARIZONA

HON. GARY K. NELSON
Attorney General
Phoenix, Arizona 85007

ARKANSAS

HON. JOE PURCELL
Attorney General
Little Rock, Arkansas 72201

COLORADO

HON. DUKE W. DUNBAR
Attorney General
Denver, Colorado 80203

CONNECTICUT

HON. ROBERT K. KILLIAN
Attorney General
Hartford, Connecticut 06115

DELAWARE

HON. DAVID P. BUCKSON
Attorney General
Dover, Delaware 19901

FLORIDA

HON. EARL FAIRCLOTH
Attorney General
Tallahassee, Florida 32304

HAWAII

HON. BERTRAM T. KANBARA
Attorney General
Honolulu, Hawaii 96813

ILLINOIS

HON. WILLIAM J. SCOTT
Attorney General
Springfield, Illinois 83702

INDIANA

HON. THEODORE L. SENDAK
Attorney General
Indianapolis, Indiana 46204

IOWA

HON. RICHARD C. TURNER
Attorney General
Des Moines, Iowa 50319

KANSAS

HON. KENT FRIZZELL
Attorney General
Topeka, Kansas 66612

KENTUCKY

HON. JOHN B. BRECKINRIDGE
Attorney General
Frankfort, Kentucky 40601

LOUISIANA

HON. JACK P. F. GREMILLION
Attorney General
Baton Rouge, Louisiana 70804

MAINE

HON. JAMES S. ERWIN
Attorney General
Augusta, Maine 04330

MARYLAND

HON. FRANCIS B. BURCH
Attorney General
Baltimore, Maryland 21201

MICHIGAN

HON. FRANK J. KELLEY
Attorney General
Lansing, Michigan 48902

MISSISSIPPI

HON. A. F. SUMMER
Attorney General
Jackson, Mississippi 39201

MISSOURI

HON. JOHN C. DANFORTH
Attorney General
Jefferson City, Missouri 65101

MONTANA

HON. ROBERT L. WOODAHL
Attorney General
Helena, Montana 59601

NEBRASKA

HON. CLARENCE A. H. MEYER
Attorney General
Lincoln, Nebraska 68509

NEW JERSEY

HON. ARTHUR J. SILLS
Attorney General
Trenton, New Jersey 08625

NEW MEXICO

HON. JAMES A. MALONEY
Attorney General
Santa Fe, New Mexico 87501

NORTH CAROLINA

HON. ROBERT B. MORGAN
Attorney General
Raleigh, North Carolina 27602

NORTH DAKOTA

HON. HELGI JOHANNESON
Attorney General
Bismarck, North Dakota 58501

OHIO

HON. PAUL W. BROWN
Attorney General
Columbus, Ohio 43215

PENNSYLVANIA

HON. WILLIAM C. SENNETT
Attorney General
Harrisburg, Pennsylvania 17120

PUERTO RICO

HON. SANTIAGO C. SOLER-FAVALE
Attorney General
San Juan, Puerto Rico 00902

RHODE ISLAND

HON. HERBERT F. DE SIMONE
Attorney General
Providence, Rhode Island 02903

SOUTH DAKOTA

HON. GORDON MYDLAND
Attorney General
Pierre, South Dakota 57501

TENNESSEE

HON. GEORGE F. MCCANLESS
Attorney General
Nashville, Tennessee 37219

TEXAS

HON. CRAWFORD C. MARTIN
Attorney General
Austin, Texas 78711

VERMONT

HON. JAMES M. JEFFORDS
Attorney General
Montpelier, Vermont 05602

VIRGINIA

HON. ROBERT Y. BUTTON
Attorney General
Richmond, Virginia 23219

WASHINGTON

HON. SLADE GORTON
Attorney General
Olympia, Washington 98501

WISCONSIN

HON. ROBERT W. WARREN
Attorney General
Madison, Wisconsin 53702

WYOMING

HON. JAMES E. BARRETT
Attorney General
Cheyenne, Wyoming 82001